

## SECTION 35. MERIT SYSTEM PROTECTION BOARD APPEALS, HEARINGS, AND INVESTIGATIONS

### 35-1. Definitions.

- (a) **Appeal:** The written request of an applicant for employment or employee for review of an administrative decision on a grievance, disciplinary action or other personnel action for which appeal privileges are provided that adversely affects employment, opportunity for employment, or promotion.
- (b) **Appellant:** The County employee or applicant for employment who files an appeal with the MSPB.
- (c) **De novo:** The MSPB's examination of an appeal anew, regardless of any prior proceedings.
- (d) **Responding party:** The party against whom the charges have been brought.
- (e) **Hearing:** An employee's appearance before 2 or more members of the MSPB or a designated hearing officer to present evidence or arguments concerning the employee's appeal.
- (f) **Deposition:** Testimony given under oath before both parties prior to a hearing that is submitted in writing as evidence in lieu of requiring the witness to appear.
- (g) **Rebuttal:** The charging party's response to evidence submitted by the responding party.
- (h) **Surrebuttal:** The responding party's response to rebuttal evidence.
- (i) **Working days:** All days except Saturdays, Sundays and official or special County holidays.

### 35-2. Right of appeal to MSPB.

- (a) Except as provided in Section 29-7 of these Regulations, an employee with merit system status has the right of appeal and a de novo hearing before the MSPB from a demotion, suspension, termination, dismissal, or involuntary resignation and may file an appeal directly with the MSPB.
- (b) An employee with merit system status may file an appeal with the MSPB over other matters after receiving an adverse final decision on a grievance from the CAO. After the development of a written record, the MSPB must review the appeal. The MSPB may grant a hearing or refer the appeal to a hearing officer if the MSPB believes that the record is incomplete or inconsistent and requires oral

testimony to clarify the issues. If the MSPB does not grant a hearing, the MSPB must render a decision on the appeal based on the written record.

- (c) An applicant or employee may file an appeal directly with the MSPB over a denial of employment.
- (d) An employee or applicant may file an appeal alleging discrimination prohibited by Chapter 27 of the County Code with the Human Relations Commission but must not file an appeal with the MSPB.
- (e) An employee or applicant for County employment who alleges discrimination on the basis of political affiliation may file a direct appeal with the MSPB.

### **35-3. Appeal period.**

- (a) An employee has 10 working days to file an appeal with the MSPB in writing after the employee:
  - (1) receives a notice of disciplinary action over an involuntary demotion, suspension, or dismissal;
  - (2) receives a notice of termination;
  - (3) receives a written final decision on a grievance; or
  - (4) resigns involuntarily.
- (b) An applicant has 10 working days to file an appeal with the MSPB in writing after the applicant receives notice that the applicant will not be appointed to a County position.

### **35-4. Appeal filing requirements.**

- (a) An appeal is a simple written statement that the appellant wants the MSPB to review the action.
- (b) After the MSPB acknowledges receipt of intent to appeal an action, the appellant must be given 10 working days to submit the following information in writing:
  - (1) appellant's name, signature and date;
  - (2) home address and telephone number;
  - (3) title of position;
  - (4) department, agency, or office, if applicable;
  - (5) concise description of the action or decision being appealed;

- (6) reason why the appellant disagrees with the action or decision; and
- (7) relief requested, subject to later modification by the appellant.

**35-5. Service requirements for a party to an appeal.**

- (a) Each party to an appeal must send to every other party a copy of every paper filed with the MSPB.
- (b) A party to an appeal must indicate on every paper filed with the MSPB that a copy was sent to the other party to the appeal.

**35-6. Appeal does not act as automatic stay of action.**

- (a) The filing of an appeal does not automatically stay the action at issue in the appeal.
- (b) The MSPB on its own motion may stay the action or grant a stay requested by the appellant based on reasons that the MSPB believes are proper and just.
- (c) If the MSPB orders a stay, it must give written notice of its action to all parties.

**35-7. Dismissal of an appeal.**

- (a) The MSPB may dismiss an appeal if the appellant did not submit the appeal within the time limits specified in Section 35-3.
- (b) The MSPB may dismiss an appeal if the appellant fails to prosecute the appeal or comply with established appeal procedures. The MSPB must give the County and the appellant prior notice of its intent to dismiss for lack of prosecution or compliance with an MSPB rule or order.

**35-8. Notification and submission of record in appeal.**

- (a) The MSPB must promptly notify the CAO, County Attorney, OHR Director, and department director in writing that an employee filed an appeal and provide the County Attorney and OHR Director with a copy of the appeal.
- (b) An appellant must respond to an MSPB request for documentation in support of an appeal within 15 working days. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.
- (c) The OHR Director and County Attorney must respond to the appeal within 15 working days and forward a copy of the action or decision appealed and all relevant reports, papers, and documents to the MSPB. The MSPB may grant an extension of time for reasons that the MSPB considers good cause.

**35-9. Appellant's right to representation.** The appellant has the right to be represented by an individual of the appellant's choosing.

**35-10. Appellant's right to review; right to hearing.**

- (a)
  - (1) An employee with merit system status has the right to appeal and to an evidentiary hearing before 2 or more members of the MSPB or a designated hearing officer from a demotion, suspension, dismissal, termination, or involuntary resignation.
  - (2) In all other cases, if the MSPB chooses not to hold an evidentiary hearing, it must conduct a review based on the written record before the MSPB.
- (b) The appealing party, the County Attorney, and the OHR Director must be served with a written notice of the time, date, and place of the pre-hearing conference.
- (c) The MSPB may assign a hearing officer to hear any case appealed to the MSPB. If the MSPB refers an appeal to a hearing officer, the hearing officer must issue a notice of hearing within 15 working days. The hearing officer must issue the notice at least 30 working days prior to the date of the hearing. Within 20 working days of completion of a hearing, the hearing officer must submit written findings and recommendations to the parties and the MSPB. Within 15 working days of receipt of the hearing officer's report, the MSPB may schedule oral arguments.
- (d) The MSPB or hearing officer designated by the MSPB must conduct hearings under the Administrative Procedures Act, Chapter 2A of the County Code (Appendix D).
- (e) The MSPB or hearing officer may:
  - (1) administer oaths;
  - (2) issue subpoenas for witnesses and documents;
  - (3) rule on petitions to revoke subpoenas;
  - (4) rule on motions and offers of proof;
  - (5) dispose of procedural requests or similar matters;
  - (6) call, examine and cross-examine witnesses;
  - (7) accept evidence by stipulation of facts;
  - (8) maintain an orderly procedure at all times;

- (9) set the time limits for a hearing or part of a hearing; and
- (10) take any action necessary to assure a fair disposition of the appeal.
- (f) A hearing must not be open to the public unless the appellant requests it in writing at the time of the prehearing submissions.

**35-11. Prehearing procedure in appeal; conduct of hearing; continuances.**

(a) ***Prehearing procedure in appeal.***

- (1) In all cases where the MSPB conducts an evidentiary hearing, the County must submit the following information to the MSPB or hearing officer and to any other party at least 20 working days before the hearing, except in cases of dismissal, suspension, demotion, or involuntary resignation that require the information to be submitted at least 15 working days before the hearing:
  - (A) complete list of charges;
  - (B) copy of all written reports, documents, photographs, charts, letters, or any other material to be introduced or used at the hearing;
  - (C) names and addresses of all prospective witnesses and a summary of their anticipated testimony;
  - (D) names and addresses of witnesses, documents, and records requiring service of a subpoena; and,
  - (E) estimated time required for presentation of the case.
- (2) Any other party must submit the same information to the MSPB or hearing officer and the County at least 10 calendar days before the hearing.
- (3) Requests, after stated deadlines, to call witnesses or to use documentation not contained in the pre-hearing submission may be granted only on good cause shown.

(b) ***Conduct of a hearing.*** The order of procedure in the conduct of a hearing is usually:

- (1) disposition of preliminary motions and matters, if any;
- (2) opening statements, which must be a summary of the appeal to be presented;

- (3) presentation of the factual case for the party making the charges and cross-examination of all witnesses;
  - (4) presentation of the factual case for the responding party and cross-examination of all witnesses;
  - (5) rebuttal evidence of the charging party;
  - (6) surrebuttal evidence of the responding party; and
  - (7) closing arguments.
- (c) **Continuances.** A party must submit a request for continuance in writing to the MSPB or hearing officer with a copy to the opposing party at least 5 working days prior to the hearing date. The MSPB or hearing officer may grant the request for a continuance where good cause is shown.

### 35-12. Testimony of witnesses at hearing; interrogatories and depositions.

(a) **Testimony of witnesses at hearing.**

- (1) All witnesses must testify under oath and only witnesses having direct knowledge of the facts on which the charges are based will be heard. The MSPB or hearing officer will hear testimony:
  - (A) directly related to the charges;
  - (B) indirectly related to the charges, provided a relevant relationship has been established; and
  - (C) of past work record, but only for the purpose of determining degree of penalty, if any.
- (2) Each party must have a reasonable amount of time to examine and cross-examine witnesses and to submit evidence. The MSPB or hearing officer may examine witnesses as deemed appropriate.
- (3) A witness under oath who intentionally falsifies material facts or willfully and falsely testifies in a hearing is subject to the penalties of perjury under State law and, if a County employee, dismissal.

- (b) **Interrogatories and depositions.** The MSPB or hearing officer may accept a statement of a witness taken by written interrogatory or a deposition made under oath. This does not preclude a party from taking a deposition or interrogatory of a witness prior to the hearing for impeachment or discovery purposes. A party must file a true copy of an interrogatory, answer, or deposition with the MSPB or hearing officer.

**35-13. Payment of witnesses for appearance.**

- (a) A department director must reimburse a County employee who is required to appear as a witness with pay or compensatory time under applicable laws and regulations.
- (b) If the witness is not a County employee, the MSPB must determine a reasonable fee that must be paid to a witness by the party that subpoenaed the witness.

**35-14. Record of MSPB proceedings.** The MSPB must record hearings.

**35-15. MSPB may enforce settlement agreements.** If a settlement agreement is before the MSPB in connection with an appeal, the MSPB may interpret and enforce the agreement.

**35-16. MSPB decisions.**

- (a) The MSPB may decide an appeal in any manner deemed necessary and appropriate, under County Code Section 33-14(c), *Hearing Authority of MSPB*. The MSPB may order appropriate relief, which includes but is not limited to the following:
  - (1) retroactive promotion or reclassification with or without back pay;
  - (2) change in position status, grade, work schedule, working conditions, and benefits;
  - (3) priority consideration for an employee found qualified before other candidates are considered;
  - (4) reinstatement with or without back pay, although the CAO may reinstate an employee either to a position previously held or to a comparable position of equal pay, status, and responsibility;
  - (5) cancellation of a personnel action found to be in violation of law or personnel regulation, but any cancellation must not, without following any process otherwise required, adversely affect the employment rights of another employee;
  - (6) participation in an employee benefit previously denied, such as training, an educational program or assistance, preferential or limited work assignments and schedules, overtime pay, or compensatory time;
  - (7) removal from administrative or personnel records of any reference or document pertaining to an unwarranted disciplinary or personnel action;
  - (8) corrective measures regarding any management procedure adversely affecting employee pay, status, working conditions, leave, or morale; and

- (9) reimbursement or payment by the County of all or part of an employee's reasonable attorney's fees.
- (b) The MSPB must:
  - (1) issue written decisions that set forth findings of fact and conclusions of law;
  - (2) include a statement of each party's appeal rights and the time limit for filing an appeal;
  - (3) send a copy of each decision to:
    - (A) the appellant or appellant's counsel of record;
    - (B) the CAO;
    - (C) the County Attorney;
    - (D) the OHR Director; and
    - (E) the department director.
- (c) An MSPB decision is final and binding unless appealed to a court of competent jurisdiction;
- (d) A court of competent jurisdiction may enforce an MSPB decision.

**35-17. Request for reconsideration of MSPB decisions.**

- (a) A party may submit a written request to the MSPB for reconsideration of a decision within 10 working days after the MSPB's decision. After the 10-day period, the MSPB must not grant reconsideration except in a case of fraud, mistake, or irregularity.
- (b) A party must submit a request for reconsideration in writing with supporting reasons and must provide a copy to any opposing party or the opposing party's representative.
- (c) A party's timely request for reconsideration stays the time for any further appeal until the MSPB makes a decision on the request. If the MSPB does not grant a reconsideration request within 10 working days after it receives the request, the request is deemed denied.

**35-18. Appeals to court of MSPB decisions.** A party may appeal a final MSPB decision by filing a petition for appeal to a court as provided in Section 33-15 of the County Code.



**35-19. Penalties for unauthorized interference with MSPB.** A person who intimidates, bribes, or attempts to coerce or influence an MSPB member, MSPB staff, or MSPB hearing officer, or a witness is subject to appropriate criminal charges and, if a County employee, is subject to dismissal.

**35-20. MSPB audits, investigations, and inquiries.**

- (a) The MSPB has the responsibility and authority to conduct audits, investigations or inquiries to assure that the administration of the merit system complies with County law and these Regulations.
- (b) County employees must not be expected or required to obey instructions that involve an illegal or improper action and may not be penalized for disclosure of such actions. County employees are expected and authorized to report instances of alleged illegal or improper actions to the individual responsible for appropriate corrective action, or report the matter to:
  - (1) the MSPB, if the individual involved in the alleged illegal or improper action is a merit system employee; or
  - (2) the Ethics Commission, if the individual involved in the alleged illegal or improper action is not a merit system employee or is an appointed or elected official or a volunteer.

**35-21. Prohibited practices; protections for employees.**

- (a) ***Prohibited practices.*** It is unlawful for any person to:
  - (1) coerce or attempt to coerce any merit system employee into taking an illegal or improper action; or
  - (2) retaliate or attempt to retaliate by taking, threatening to take, or withholding a personnel action because of that employee's:
    - (A) refusal to obey an illegal or improper instruction; or
    - (B) disclosure of information related to an illegal or improper instruction.
- (b) ***Protection for employee.***
  - (1) The MSPB, Ethics Commission, or Inspector General, as appropriate, must protect a merit system employee from any retaliatory or coercive action for:
    - (A) refusing to obey an instruction involving an illegal or improper action; or

- (B) disclosing information that the employee reasonably believed:
  - (i) was true and accurate; and
  - (ii) concerned an illegal or improper action.
- (2) The MSPB, Ethics Commission, or Inspector General, as appropriate, must not protect the employee if it is determined that:
  - (A) the employee's actions were frivolous, unreasonable, and without foundation, even if made in good faith;
  - (B) the employee failed, without good cause, to comply with laws or regulations concerning the making of such disclosures; or
  - (C) the employee was the subject of an otherwise proper personnel action taken for disciplinary reasons and not for retaliatory purposes.

### **35-22. Filing of complaints.**

- (a) If an employee believes a retaliatory action or coercion has taken place or been attempted because the employee refused to obey, or disclosed, an illegal or improper instruction, the employee may file a written complaint with the MSPB. The employee must file the complaint within 60 days after the alleged violation or action and must include:
  - (1) the employee's name, signature, home address, and telephone number;
  - (2) name of the individual who allegedly took the action; and
  - (3) a concise description of the action and why the employee believes the action was coercive or retaliatory.
- (b) The identity of all parties must be kept confidential unless:
  - (1) the MSPB finds probable cause to believe that the action was coercive or retaliatory; or
  - (2) all parties waive confidentiality in writing.
- (c) The MSPB may initiate an inquiry of any person suspected of taking retaliatory or coercive action, with or without a written complaint from an employee.

### **35-23. Investigation of complaint.**

- (a) MSPB investigative proceedings are confidential. The MSPB may disclose information about the proceeding only as necessary to complete the investigation.

- (b) The MSPB may use a special personnel investigator who is independent of the County government to conduct an investigation to determine if there is probable cause to believe a retaliatory or coercive action has occurred or was attempted.
- (c) The MSPB or special investigator must complete the investigation within 30 working days after the MSPB received the complaint and must take one of the actions described in (d), (e), or (f) below.
- (d) If the MSPB determines that the subject matter of the complaint involved allegations properly covered by the grievance process or other laws or regulations, the MSPB must advise the employee in writing and may dismiss the complaint.
- (e) If the MSPB determines that no probable cause exists, the MSPB must dismiss the complaint and notify the employee in writing of the reasons for the finding and that the dismissal is final, unless the employee files a request for reconsideration.
- (f) If the MSPB determines that probable cause does exist, the MSPB must:
  - (1) notify the employee in writing;
  - (2) prepare and serve on the person believed to have violated County Code Section 33-10(c) a statement of charges fairly describing the alleged violation and the sanctions sought for the violation; and
  - (3) conduct a hearing on the charges under Section 35 of these Regulations, with MSPB staff acting as the charging party.

**35-24. Due process protections.**

- (a) The MSPB must prepare a memorandum before an investigation stating the legal authority, scope, and beginning date of the investigation.
- (b) At least 5 working days before an employee is expected to participate as a witness, custodian of records, or possible subject, the MSPB must give the employee a written request to participate that includes the following:
  - (1) date of the request;
  - (2) name of the employee whose participation is requested;
  - (3) whether the employee is requested to participate as a witness, custodian of records, or possible subject of the investigation;
  - (4) name of the investigative authority;
  - (5) name of the individual conducting the investigation;

- (6) law or regulation authorizing the investigation and the request for participation;
  - (7) subject areas to be covered in the investigation;
  - (8) if the employee is a possible subject, a clear and detailed statement of all allegations of misconduct;
  - (9) notice that the employee has the right to be assisted by legal counsel; and
  - (10) signature of the chairperson of the MSPB certifying that the MSPB has officially initiated an investigation and requested the employee's participation.
- (c) Within 30 days after the employee's participation, the MSPB must provide the employee with a copy of:
- (1) a transcript or recording of all questions asked to the employee and the employee's responses;
  - (2) a complete set of notes of all questions asked to the employee and the employee's responses, if there is no verbatim transcript or recording; and
  - (3) all documents that the employee has been asked to identify or review.
- (d) Within 90 days after the employee's participation, the MSPB must, if applicable, serve the employee with written notice of intent to take an action that may adversely affect the employee's terms and conditions of employment. The written notice must include a statement of appeal rights and the time limit for filing an appeal.
- (e) After the investigation is finished, the MSPB must deliver to each employee requested to participate:
- (1) a statement that the investigation is finished; and
  - (2) a complete description of all actions taken or planned that may adversely affect the employee's employment.

### **35-25. Penalties.**

- (a) If a County employee is found guilty of coercion, harassment, or retaliation, under Section 33-10 of the County Code and this section of the Personnel Regulations, the MSPB may order one or more of the following penalties:
- (1) any disciplinary action provided for in these Personnel Regulations up to and including dismissal;

- (2) a monetary fine of up to \$1,000;
  - (3) reimbursement of expenses incurred by all parties; or
  - (4) other penalties that the MSPB considers appropriate and consistent with the County Charter and law.
- (b) The MSPB must give an employee subject to a penalty a written notice that includes:
- (1) a statement of the employee's appeal rights; and
  - (2) the time limit for filing an appeal.

**35-26. Appeals.** An employee subject to a penalty based on the MSPB's findings and decision may appeal the decision to a court.

**Editor's note** – The subjects covered in this section of the Personnel Regulations are addressed for bargaining unit employees in the current collective bargaining agreements as indicated below:

<b>Bargaining unit</b>	<b>Articles of current agreements with references to MSPB</b>
Firefighter/Rescuer	38, Contract Grievance Procedure
OPT/SLT	10, Grievances 46, Records
Police	34, Grievance Representation 51, Personnel Files 52, Termination